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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK and SHERRY R. FRINK,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOINT APPENDIX OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

JOINT APPENDIX
VOLUME II

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T. C. Memo. 1984-669

UNITED STATES TAX COURT

GARY R. FRINK AND

SHERRY R. FRINK, et al.[1] Petitioners

v. COMMISSIONER OF INTERNAL REVENUE,

Respondent

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1. By our Order dated January 9, 1984, granting petitioners' motion to consolidate, which was not opposed by respondent, cases of the following petitioners were consolidated herewith: James M. George and Margaret C. George, Docket No. 14917-81; Gary R. Frink and Sherry R. Frink, Docket No. 17023-81; Hollis O. Graham and Ida G. Graham, Docket No. 26983-82; George A. Wolcott and Dorothy Wolcott, Docket No. 26984-82; Tuncay Ertan and Nona G. Ertan, Docket No. 26985-82; Caroline Norton, Executrix, Estate of Coman S. Norton, Docket No. 26986-82; Roland M. Toups and Kathryn B. Toups, Docket No. 26987-82; David R. Carpenter and Erica J. Carpenter, Docket No. 26988-82; Charles A. Prince and Ruth O. Prince, Docket No. 26989-82; Harry R. Layne and Janet J. Layne, Docket No. 26990-82; Stephen G. Abshire and Mary B. Abshire, Docket No. 26991-82; Janet F. Baum, Docket No. 26992-82; Kenneth G. Fink, Jr. and Carol Fink, Docket No. 26993-82; Donald L. McCollister and Sandra M. McCollister, Docket No. 26994-82; Robert A. Rayford and Iris B. Rayford, Docket No. 27128-82; Frem F. Boustany, Sr. and Beatrice J. Boustany, Docket No. 27291-82; Frem F. Boustany, Jr. and Angell F. Boustany, Docket No. 27292-82; Sidney Frederick and Irene S. Frederick, Docket No. 4048-83; Roland M. Toups and Kathryn B. Toups, Docket No. 7720-83.

Filed December 27, 1984.

[Served Dec. 27, 1984]

Docket Nos. 12544-80, 14917-81, 17023-81, 26983-82, 26984-82, 26985-82, 26986-82, 26987-82, 26988-82, 26989-82, 26990-82, 26991-82, 26992-82, 26993-82, 26994-82, 27128-82, 27291-82, 26292-82, 4048-83, 7720-83.

D. Irvin Couvillion,
for the petitioners.

Kathleen O. Lier, A. Albert Ajubita,
for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

KORNER, Judge: Respondent determined deficiencies and additions to tax against petitioners in these cases as follows:[2]

Petitioners	Docket No.	Tax year ended	Deficiency
Gary R. Frink	12544-80	12/31/75	$10,253.00
Sherry R. Frink		12/31/76	6,203.00

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2. Respondent has conceded the additions to tax under sec. 6651(a), which he had determined as to petitioners Norton and Baum in Docket Nos. 26986-82 and 26992-82, respectively.

Petitioners	Docket No.	Tax year ended	Deficiency
James M. George	14917-81	12/31/75	15,285.90
Margaret C. George		12/31/76	18,621.70[3]
		12/31/77	5,131.77
Gary R. Frink	17023-81	12/31/77	2,400.85
Sherry R. Frink			
Hollis O. Graham	26983-82	12/31/75	26,405.00
Ida G. Graham		12/31/76	13,972.00
George A. Wolcott	26984-82	12/31/75	11,404.65
Dorothy Wolcott		12/31/76	6,484.33
		12/31/77	3,935.53
Tuncay Ertan	26985-82	12/31/75	13,869.00
Nona G. Ertan		12/31/76	6,920.00
		12/31/77	2,943.00
Caroline Norton,	26986-82	12/31/76	15,040.17
Executrix, Estate		12/31/77	2,914.00
of Coman S. Norton[4]			

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3. Petitioners George concede $3,000.50 of this deficiency, as determined by respondent for 1976.

4. This determination and that made in Docket No. 26992-82, were made with respect to the joint and several liability of Coman Norton,

Petitioners	Docket No.	Tax year ended	Deficiency
Roland M. Toups	26987-82	12/31/75	25,605.00
Kathryn B. Toups		12/31/76	43,014.00
David R. Carpenter	26988-82	12/31/77	21,447.00
Erica J. Carpenter			
Charles A. Prince	26989-82	12/31/76	755.60
Ruth O. Prince			
Harry R. Layne	26990-82	12/31/75	22,901.00
Janet J. Layne		12/31/76	1,411.00
		12/31/77	1,252.00
Stephen G. Abshire	26991-82	12/31/75	19,681.00
Mary B. Abshire		12/31/76	11,543.00
		12/31/77	2,472.00
Janet F. Baum	26992-82	12/31/76	15,040.17
		12/31/77	2,914.00

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deceased, and Janet F. Baum (formerly Janet F. Norton), his wife during the years in issue and petitioner in the latter case.

Petitioners	Docket No.	Tax year ended	Deficiency
Kenneth G. Fink, Jr.	26993-82	12/31/77	62,804.00
Carol Fink			
Donald L. McCollister	26994-82	12/31/77	10,085.00
Sandra M. McCollister			
Robert A. Rayford	27128-82	12/31/75	30,029.40
		12/31/76	13,225.61
Iris B. Rayford		12/31/77	11,502.20
		12/31/78	7,271.00[5]
Free F. Boustany, Sr.	27291-82	12/31/75	34,596.40
Beatrice J. Boustany		12/31/76	47,530.52
		12/31/77	65,870.90
Free F. Boustany, Jr.	27292-82	12/31/76	31,687.00
Angell F. Boustany		12/31/77	31,658.00
Sidney Frederick	4048-83	12/31/76	31,195.21
Irene S. Frederick		12/31/77	12,213.90
Roland M. Toups	7720-83	12/31/77	39,265.00
Kathryn B. Toups			

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5. Petitioners Rayford concede the deficiency determined against them for 1978.

By amended answers, respondent asserted additional deficiencies, resulting in the following increased deficiencies in three of the foregoing cases:[6]

Petitioners	Docket No.	Tax Year ended	Increased deficiency
David R. Carpenter Erica J. Carpenter	26988-82	12/31/77	$23,727.00
Kenneth G. Fink, Jr. Carol Fink	26993-82	12/31/77	69,239.00
Donald L. McCollister Sandra M.McCollister	26994-82	12/31/77	11,165.00

After concessions, the issues remaining for our decision are: (1) Whether losses generated by the construction and operation of the Biloxi

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6. Increased deficiencies asserted by amended answer by respondent in Docket Nos. 27291-82, 27292-82, and 7720-83, were conceded by respondent at trial.

Hilton Hotel project are attributable to two corporations, styled Argo Hotels, Inc. and Coastal Golf, Inc., which held legal title thereto, or to the individual petitioners herein, as partners in commendam[7] in Biloxi Hotel Properties Partnership; and (2) whether the allocations of losses provided for in the written agreement of such partnership, as amended, possessed substantial economic effect in 1977 as to the three petitioners who entered the partnership as partners in commendam on December 16, 1977.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of facts and exhibits attached thereto are incorporated herein by this reference.

Petitioners, who resided in the following locations at the times they

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7. In all material respects, a partner in commendam under La. Civ. Code Ann. art. 2839-2851, (West 1952), is a limited partner. Tatum v. Acadian Production Corp., 35 F. Supp. 40 (E.D. La. 1940).

filed their petitions herein, filed their Federal income tax returns for the years in issue with the following Internal Revenue Service Centers:

		Returns		
Petitioners	Residence	Year	Date filed	Service center
Gary R. Frink	Luray,	1975	4/15/76	Cincinnati,
	Virginia	1976	4/15/77	Ohio
Sherry R. Frink	Annapolis,	1977	4/15/78	
	Maryland			
James M. George	Lumberton,	1975	4/15/76	Atlanta,
Margaret C. George	Mississippi	1976	4/15/77	Georgia
		1977	4/14/78	
Hollis O. Graham	Ruston,	1975	4/15/76	Austin,
Ida G. Graham	Louisiana	1976	4/15/77	Texas
George R. Wolcott	Houston,	1975	4/15/76	Austin,
	Texas	1976	4/15/77	Texas
Dorothy Wolcott		1977	4/15/78	
Tuncay Ertan	Alexandria,	1975	4/15/76	Austin,
Nona G. Ertan	Louisiana	1976	4/15/77	Texas
		1977	4/15/78	

		Returns		
Petitioners	Residence	Year	Date filed	Service center
Caroline Norton Executrix, Estate of Conan S. Norton	Baton Rouge, Louisiana	1976 1977	4/15/77 4/15/78	Austin, Texas
Roland M. Toups Kathryn B. Toups	Baton Rouge, Louisiana	1975 1976 1977	4/15/76 4/15/77 4/15/78	Austin, Texas
David R. Carpenter Erica J. Carpenter	Baton Rouge, Louisiana	1977	4/15/78	Austin, Texas
Charles A. Prince Ruth O. Prince	Alexandria, Louisiana	1976	4/15/77	Austin, Texas
Harry R. Layne Janet J. Layne	Mandeville, Louisiana	1975 1976 1977	4/15/76 4/15/77 4/15/78	Austin, Texas
Stephen G. Abshire Mary B. Abshire	Lafayette, Louisiana	1975 1976 1977	4/15/76 4/15/77 4/15/78	Austin, Texas
Janet F. Baua	Baton Rouge, Louisiana	1976 1977	4/15/77 4/15/78	Austin, Texas

		Returns		
Petitioners	Residence	Year	Date filed	Service center
Kenneth G. Fink, Jr. Carol Fink -	Denham Springs,	1977	4/15/78	Austin, Texas
Donald L. McCollister Sandra M. McCollister	Baton Rouge, Louisiana	1977	4/15/78	Austin, Texas
Robert A. Rayford Iris B. Rayford	Alexandria, Louisiana	1975 1976 1977	4/15/76 4/15/77 4/15/78	Austin, Texas
Free F. Boustany, Sr. Beatrice J. Boustany	Lafayette, Louisiana	1975 1976 1977	4/15/76 4/15/77 4/15/78	Austin, Texas
Free F. Boustany, Jr. Angell F. Boustany	Crowley, Louisiana	1976 1977	4/15/77 4/15/78	Austin, Texas
Sidney Frederick Irene S. Frederick	Lafayette, Louisiana	1976 1977	4/15/77 4/15/78	Austin, Texas

In 1972, John C. Yemelos (hereinafter "Yemelos") and his mother-in-law, Phopho Cosmas (hereinafter

"Cosmas"), formed a partnership or joint venture known as Casren Development Company (hereinafter "Casren"). Yemelos owned 80 percent of Casren, and Cosmas owned the remaining 20 percent. In that same year, Casren undertook the project of developing the Biloxi Hilton Hotel, a commercial resort and convention-oriented hotel to be constructed in Biloxi, Mississippi.

By warranty deed dated November 6, 1972, acting on behalf of Casren, Yemelos acquired title in his own name to 7.5 acres of land located in Biloxi, Mississippi (hereinafter "hotel site").

In December of 1972, Yemelos applied to Hilton Inns, Inc. for a license or franchise to operate a Hilton hotel, relative to which a fee of $20,000 was paid. On August 20, 1973, Hilton Inns, Inc. issued a license or franchise to operate a Hilton Hotel for a period of 20 years to Yemco, Inc. (hereinafter "Yemco"), which was a corporation whose sole shareholders were Yemelos and Cosmas.

By deeds both dated September 24, 1973, again acting on behalf of Casren,

Yemelos purchased in his own name two additional strips of land adjoining the hotel site. These parcels, known as Vapors Club and Stag Club, were purchased for a total consideration of $376,566.99.

On October 2, 1975, acting on behalf of Casren, Yemelos purchased an additional five acres of land from the Small Business Administration (hereinafter "S.B.A. parcel") for a total consideration of $210.000. Title to the S.B.A. parcel remained in Yemelos' name until July 29, 1977, at which time it was transferred by warranty deed to an entity known as Biloxi Hotel Properties Partnership.

Seeking construction financing for the hotel project, Yemelos was referred in 1973 to a real estate investment trust located in the Washington, D.C. area, known as Mortgage Investors of Washington (hereinafter "MIW"). On April 17, 1973, MIW executed a Mortgage Loan Commitment in favor of Yemco, wherein it committed to loan $6,700,000 for the construction of a seven-story, convention-oriented hotel on the hotel

site in Biloxi, Mississippi. The loan commitment called for an interest rate of 4-1/2 percentage points in excess of the prime interest rate of Chemical Bank of New York, to be adjusted monthly. The commitment further provided that Yemelos and his wife were to supply MIW with an irrevocable letter of credit in its favor from Colonial Bank of New Orleans (hereinafter "Colonial") in the amount of $500,000.

Both yemelos and MIW were aware that the interest to be charged by MIW for construction of the hotel would be usurious under Mississippi law if made to an individual or a partnership.[8]

In negotiations concerning the construction financing, MIW was represented by Charles R. Galloway (hereinafter "Galloway"), an attorney whose practice was located in Gulfport, Mississippi. Galloway's services were engaged through Henry Sarpy of New Orleans, Louisiana,

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8. Pursuant to Miss. Code Ann. Sec. 75-17-1 (1972), as to non-corporate entities, the "legal rate" of interest in 1973 was 6 percent per annum, but contracts could be made for payment of a rate as high as 8 percent.

another attorney who represented MIW on occasion. When Yemelos and his accountant, Ronald F. Gregory, first met with Galloway concerning the construction loan, they discussed the foregoing usury problem under Mississippi law. To avoid this problem, Yemelos and Gregory indicated that they wished to use a so-called "conduit corporation" to borrow the funds from MIW. Galloway understood that this term meant a corporation which would hold legal title to property as an agent for the holder of equitable title, in order to facilitate financing arrangements with respect to such property.

Also during 1973, Yemelos was involved in the formation of a new corporation, known as Argo Hotels, Inc. (hereinafter "Argo"). On April 12, 1973, Argo was incorporated by Yemelos under the laws of the State of Louisiana. Argo was formed, as stated in its Articles of Incorporation, for the following purposes:

> To hold title to real estate, to borrow money and make loans on said real estate for the ac-

> count of and for the beneficial interest of its stockholders and to take such other action in connection with such real estate as may be required of it by the beneficial owner or owners thereof, and to engage in any other lawful activity for which corporations may be formed under the Louisiana business Corporation Law.

Yemelos and his wife, Despina Cosmas Yemelos, were the sole officers, directors and shareholders of Argo, but they paid no consideration for their stock.

Yemelos and Gregory suggested to Galloway that Argo could be used as a "conduit" for the purpose of avoiding local usury restrictions. Galloway responded that he already owned a conduit corporation, styled "C. M. Conduit" (hereinafter "Conduit"), which he had used to avoid similar problems in the past, and which could be used in this instance. Galloway preferred to use Conduit for this purpose since he believed that it was important to separate the legal and equitable owner-

ship of the property, an objective which he felt would not be served by use of Yemelos' corporation, Argo.

Galloway, who was the sole shareholder and, together with his children, was a director of Conduit, described the purpose of the corporation as follows:

> [T]o have a corporate body, having a real business purpose, for use by persons who needed to borrow money, and for one reason or other, frequently because of the interest rate, found it necessary to make the loan through a corporation rather than through an individual.

For its services, Conduit typically charged a fee of $1,000, although that sum would vary depending upon the size of the loan, the time periods involved, and the risks assumed by the corporation. In this instance, Galloway advised, Conduit's fee would be $1,000.

Several weeks following his meeting with Galloway, Yemelos accepted the recommendation to use Conduit, in con-

nection with the MIW financing, pursuant to the foregoing terms. In accordance with this decision, Galloway prepared a set of specimen documents and sent them to Henry Sarpy in New Orleans with a request that they be submitted to MIW for its approval.

After a period of several weeks, Galloway was advised that MIW had rejected the use of Conduit, at least in part because it did not approve of the word "conduit" in the corporate name. Since it was the only other option then under consideration, and in view of the shortness of time before the scheduled closing, Galloway and Yemelos decided that Argo should receive legal title to the subject property.

On October 5, 1973, Yemelos and Argo entered into a trust agreement, pursuant to which it was agreed, inter alia, that: (1) Argo would act as Yemelos' agent in securing the MIW loan on his behalf; (2) Yemelos would indemnify Argo against all claims arising under the agreement; (3) Yemelos would fund all disbursements incident to the loan; (4) Yemelos would personally

guarantee the loan; and (5) Argo would "transact no business whatsoever for its own account as long as record title to this property and construction project remain in its name."

Argo qualified to do business in the State of Mississippi on October 8, 1973. On the application to so qualify Argo, Yemelos described the purposes of the corporation as follows:

> to hold title to real estate, to borrow money and to make loans on said real estate and to take such other action with such real estate as may be required of it by the beneficial owner or owners thereof. [Emphasis added.]

In connection with MIW's loan in the amount of $6,700,000, which was supplemented in May of 1974, and again in May of 1975, in the respective amounts of $500,000 and $800,000, for a total loan of $8,000,000, the following pertinent documents were executed on the dates shown:

(1) October 10, 1973 - a warranty deed, whereby Yemelos conveyed to Argo

title to the hotel site for the sum of $100;

(2) October 10, 1973 - a conditional assignment of the Hilton license or franchise by Yemco to MIW, as partial security for the construction financing;

(3) October 10, 1973; May 17, 1974; May 12, 1975 - notes and deeds of trust, executed by Argo in favor of MIW in the respective amounts of $6,700,000, $500,000 and $800,000;

(4) October 10, 1973; May 17, 1974; May 12, 1975 - building loan agreements, wherein Argo and MIW agreed to certain advances for certain stages of construction;

(5) October 10, 1973; May 17, 1974; May 12, 1975 - continuing construction loan guarantees, wherein Yemelos and his wife personally guaranteed MIW's loans to Argo; and

(6) October 10, 1973; May 17, 1974[9]

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9. The date of another affidavit, executed in connection with the $800,000 supplemental financing in 1975, cannot be determined on this record.

- affidavits executed by Yemelos and his wife for the purpose of inducing MIW to lend Argo the subject construction funds.

None of the foregoing notes, deeds of trust, building loan agreements or continuing construction loan guarantees describe Argo as an "agent," "nominee" or "conduit" corporation. Each of the foregoing affidavits provides that Argo is the "owner" of the hotel site. It was Galloway's understanding, however, that the term "owner," as used in this context, related to legal ownership and not to equitable or beneficial ownership of the property.

On October 10, 1973, Argo also entered into building contracts with two separate building companies for construction of a portion of the hotel project, in each of which Argo was described as "owner." Yemelos owned 50 percent of each such building company.

On October 9, 1973, pursuant to the terms of MIW's initial loan commitment, Colonial issued an irrevocable letter of credit in favor of MIW for the account of Argo for a sum not to exceed

$500,000. As security therefor, on October 10, 1973, Argo executed a deed of trust in favor of Colonial in the amount of $550,000. This deed of trust was subordinate to the deed of trust in favor of MIW.

One Edward J. DeMartini was an attorney in Louisiana who represented Colonial as well as Argo, and who was additionally a director of Colonial. DeMartini and Galloway in early October of 1973, and Galloway again in May of 1974, advised MIW in writing that its documentation for the loan to Argo would establish "valid and binding obligations of the persons or entities purporting to be bound thereby * * *." At such times, however, DeMartini and Galloway, as well as Colonial, believed that Argo held solely legal title to the hotel properties, and that it held such title as agent for Yemelos.

At all times here pertinent, it was similarly the understanding of Peyton Fletcher III, the president of MIW, that Yemelos was the real borrower with whom MIW was dealing, and that the construction loan was being made to a "nominee"

corporate entity solely because of Mississippi usury laws.

During construction of the hotel, most draws from MIW were paid to Galloway and deposited by him into a trust account which he maintained. Funds were then disbursed from such account directly to each contractor or supplier upon verification that the services or materials had been provided. Some checks for construction work were made payable to Argo, but these checks were deposited in Casren's bank account.

On June 10, 1974, Omicron Corporation (hereinafter "Omicron") was formed under the laws of the State of Mississippi by Yemelos, his wife and Cosmas. Yemelos was the sole shareholder of Omicron. Omicron performed all management services for the Biloxi Hilton Hotel, receiving a fee in the amount of two percent of the gross revenues collected by it.

In April of 1975, the Biloxi Hilton Hotel project was completed and placed in service.

On August 1, 1975, Coastal Golf, Inc. (hereinafter "CG") was formed under

the laws of the State of Mississippi by Galloway and one Robert C. Galloway, for the following purposes:

> To acquire and operate golf courses, tennis courts, amusement parks and other properties providing private and public entertainment, and generally to engage in the business of owning and operating places of amusement, entertainment and recreation.

Yemelos was CG's president, and Yemelos and his wife were its sole shareholders and, together with Galloway, directors.

On August 19, 1975, CG purchased from Bankers Trust Savings and Loan Association (hereinafter "Bankers Trust") for the sum of $1,045,000, an established golf course, known as the Edgewater Golf Course (hereinafter "golf course"), which was situated near the Biloxi hotel project. It was intended that the golf course would be maintained as part of the hotel facility. Acting as CG's president, Yemelos executed a note for the full amount of the purchase price, of which he also personally

guaranteed repayment of $100,000. In neither the note nor the guarantee is CG described as an "agent," "nominee" or "conduit" corporation.

In structuring the sale of the golf course it was Yemelos' wish to limit his personal liability to $100,000, a wish to which the bank acceded because it had previously foreclosed on the golf course and was anxious to sell it. While Yemelos' interests might have been met by his execution of a partial recourse note in favor of Bankers Trust, it was apparently the bank's interest to carry a recourse indebtedness in the full amount of the note as a current asset on its financial statements, and this interest could not be met through such a partial recourse financing arrangement. It was accordingly decided by both parties that title to the golf course would be held by CG, that Bankers Trust would make its recourse loan to the corporation, and that such loan would be guaranteed by Yemelos to the limited extent of $100,000. Unlike the construction financing provided by MIW, there was no usury problem under Mississippi

law associated with Bankers Trust's loan for acquisition of the golf course.

As a result of cost overruns during construction of the hotel and excessive losses during its start-up period, in late 1975, Yemelos contacted Robert G. Jackson, an attorney who was involved in real estate syndications, concerning the possibility of admitting new investors into Casren. Jackson was aware that the hotel site and golf course were titled in the names of Argo and CG, but he also believed that those corporations held title as "nominees," and that it was Casren which really owned the project.

Jackson and Yemelos held a number of meetings to discuss the capital contributions which would be made by investors, their return on capital, the equity Yemelos was to retain as general partner, and the fee Yemelos would receive. Such discussions took account of the combined investments of Yemelos and Cosmas in the project, the risks assumed by Yemelos, which were greater than those assumed by general partners in other syndications handled by Jjackson, and the services provided for the

project by Yemelos and the corporations which he controlled.

Initially, Yemelos sought an equity interest in the partnership of over 60 percent plus a six percent management fee for Omicron. It was the equity interest which was most important to him, however, and it was ultimately decided that he would receive an approximate equity interest of 65 percent, but the management fee of only two percent for Omicron would be maintained.

On December 1, 1975, a private placement memorandum was issued, soliciting investors in the partnership. The memorandum recited, inter alia, that the partnership would own and operate the project, but that legal title to the hotel and golf course would be held by two nominee corporations, Argo and CG, for the equitable and beneficial interest of the partnership.

On December 30, 1975, Casren applied for authority to sell limited partnership interests in Mississippi, and the application was granted the next day. The interests were to be sold through the conversion of Casren under

Louisiana law to a partnership in commendam, to be known as the Biloxi Hotel Properties Partnership (hereinafter "BHPP"). On December 31, 1975, articles of partnership in commendam for BHPP were executed, but for undisclosed reasons they were not registered with the State of Louisiana until September 17, 1981.

On December 31, 1975, two so-called "nominee agreements" were executed. In one such agreement, reciting that certain real estate and improvements for the hotel project had been "placed in the record name" of Argo by Yemelos in October 1973, it was agreed by Argo and BHPP that: (1) Argo would act only for the account of BHPP; (2) BHPP would indemnify Argo against any loss or liability arising through its actions; (3) Argo held title solely as nominee for BHPP; and (4) title to the real estate comprising the hotel project "is for the equitable, legal and beneficial ownership of [Casren] * * * which * * * has since been converted into [BHPP]." In the second nominee agreement, which was between CG and BHPP, it was declared

in similar terms that CG held title to certain real estate and improvements for the hotel project solely as nominee for BHPP. Neither of these agreements were publicly recorded in Louisiana or Mississippi.

Also on December 31, 1975, the following documents were executed relative to the hotel project properties: (1) A warranty deed, by which Yemelos conveyed the Vapors Club and Stag Club parcels to BHPP; and (2) a document executed by Yemelos and his wife, in their capacities as individuals and not as partners, purporting to convey to BHPP, all of their beneficial interests in any properties held by Argo and CG, and declaring that BHPP was the legal and equitable owner of such properties.

Pursuant to BHPP's articles of partnership, Yemelos and Cosmas were named as general partners, and they owned 68.9 percent and 5.3 percent partnership interests, respectively. The remaining 25.8 percent ownership interest was divided among the partners in commendam, included among whom were twelve of the petitioners in this case.

The partners in commendam admitted on December 31, 1975, contributed cash and notes in the total amount of $2,317,700 for their foregoing interest. Yemelos and Cosmas contributed the balances in their capital accounts in Casren in the respective amounts of $142,600 and $450,000.

As a result of continued financial problems, on November 9, 1976, BHPP's articles were amended to provide for the addition of new partners in commendam. Under the amended articles, the interests of Yemelos and Cosmas were reduced to approximately 61.76 percent and 5 percent, respectively. The remaining 33.24 percent interest was divided between the existing partners in commendam, who now owned a collective interest of approximately 23.24 percent, and the new partners in commendam, who contributed a total of $1,042,650 for a collective interest of 10 percent, and included among whom were an additional two of the petitioners herein.

At the request of BHPP, on December 27, 1976, CG conveyed title to the golf course to Argo. In consideration of

Argo's grant of a lien on the golf course to MIW (which lien was to be subordinate to that of Bankers Trust), and of BHPP's agreement to expressly assume joint and several liability with Argo relative to its $8,000,000 indebtedness to MIW, the latter on the same date agreed to limit the extent to which it might have recourse to the partners of BHPP in any action to enforce such indebtedness. Also on December 27, 1976, MIW agreed to modify the continuing loan guaranty provided by Yemelos and his wife on May 17, 1974, so as to limit their liability to the approximate sum of $3,950,000. In the documentation executed relative to the foregoing agreements to which MIW was a party, the declaration was made repeatedly that Argo held title to the subject properties for the benefit of BHPP.

On December 16, 1977, as a result of continued operating losses, BHPP's articles were once again amended to provide for the addition of new partners in commendam. Under the amended articles, the interests of Yemelos and Cosmas were reduced to approximately

53.94 percent and 4.35 percent, respectively. The remaining 41.71 percent interest was divided between the new and existing partners in commendam, six of whom were so-called "newly admitted" partners, and included among whom were an additional three of the petitioners herein. These latter three newly admitted partners in commendam, petitioners Carpenter, Fink and McCollister, acquired partnership interests of .5, 1.488 and .3 percentages, respectively, in return for contributions of $50,000, $148,800 and $30,000, respectively. Together, the six newly admitted partners acquired a partnership interest of 5.888 percent.

At the end of 1977, petitioners Carpenter, Fink and McCollister registered positive capital account balances in BHPP, in the respective amounts of $978, $2,910, and $587.

Under the second amended articles, for all years following 1980, all items of partnership income, gain, loss, deduction or credit were generally to be allocated to the partners in proportion to their ownership interests. For 1977

through 1980, however, such items would be allocated among the partners in certain prescribed percentages, with 97.2 percent of such items allocated to the six "newly admitted" partners for the period December 16, 1977 through December 31, 1977.

In the event of the liquidation or termination of BHPP, any partner in commendam having a deficit balance in his capital account would not be required to contribute to the partnership or to its creditors the amount of such deficit balance, nor would any such partner receive a proportionately smaller share of partnership assets under the foregoing partnership agreements. Pursuant to the second amendment to the partnership agreement, upon a sale of all or part of BHPP's property, the proceeds would be distributed, in the sole discretion of the general partners, to certain preferred groups, and then in the following percentages to the generic groupings of partners in commendam described:

Partners in commendam	Allocable percentage
Existing	52.148
Additional	26.048
Increasing	7.094
Newly admitted	14.710

Within the foregoing groupings, the proceeds were required to be distributed in proportion to each partner's ownership of "partnership stock," as defined in the agreement.

The percentage ownership interests of those partners in commendam in BHPP who are petitioners herein, were as follows as of the date of each of the foregoing amendments to its partnership articles:

Petitioner	Percentage interest		
	12/31/75	11/9/76	12/16/77
James M. George	.60	-[10]	-
Coman S. Norton	.30	-	-
Roland M. Toups	.60	1.60	1.9255
Hollis O. Graham	.60	-	-
Gary R. Frink	.30	-	-
Harry R. Layne	.60	-	-
Frem F. Boustany, Sr.	.60	1.60	2.251
George A. Wolcott[11]	.30	-	-
Robert A. Rayford	.60	-	-
Stephen G. Abshire	.45	-	-
Charles A. Prince	.30	-	-
Tuncay Ertan	.30	-	-
Frem F. Boustany, Jr.		1	1.3255
Sidney Frederick		1	-
Donald L. McCollister			.3
David R. Carpenter			.5
Kenneth G. Fink			1.488

All of the partners' capital contributions to BHPP were deposited into bank accounts maintained either by

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10. A dash indicates that there was no change in the partner's ownership interest.

11. In an apparent misspelling, Wolcott is referred to in the articles as "Wilcott."

Omicron, doing business as the Biloxi Hilton, or by BHPP. To the extent that portions of the capital contributions made by certain partners were in the form of promissory notes in favor of BHPP, such notes were always made payable to BHPP.

At all times here pertinent, Argo was a viable and active corporation which performed business activities including holding title to real estate, executing mortgage and deeds of trust, negotiating loans, entering into contracts, including a nominee agreement with BHPP, acquiring personal property, subjecting itself to third-party claims during construction, receiving income, incurring expenses, and filing Federal and state income tax returns. Similarly, CG was a viable and active corporation which performed business activities essentially comparable to those performed by Argo.

No bank accounts were ever opened in the names of Argo or CG. No capital was ever contributed to either corporation, and neither corporation had any employees.

On July 29, 1977, the hotel site, golf course and other properties were transferred to BHPP, at its request, as follows:

Transferor	Property
(1) Argo	Hotel property and golf course
(2) Argo and CG	Golf course personal property
(3) Omicron, CG and Yemco	All hotel personal property
(4) Yemelos, individually	S.B.A. parcel

Also in July of 1977, permanent financing for the hotel was closed with Equitable Life Assurance Society of the United States.

On March 7, 1980, a fee of $100 was paid to Argo, and reported by it on its 1980 Federal income tax return. A fee of $100 was paid to CG on the same date, and reported by it on its 1980 Federal income tax return.

On its returns for 1975, 1976 and 1977, BHPP claimed the following losses attributable to the construction and operation of the Biloxi Hilton Hotel project:

Period	Net Loss
12/31/75	$684,999.00
1/1/76 - 10/31/76	969,358.94
11/1/76 - 12/31/76	598,594.00
1/1/77 - 7/28/77	575,447.00
7/29/77 - 12/15/77	704,741.00
12/16/77 - 12/31/77	593,913.00
Total	$4,127,052.94

Corporate income tax returns were filed in the name of Argo for each of those same years, and in the name of CG for 1976 and 1977, reflecting neither income, deductions nor tax liability, and reciting that each corporation was a nominee which transacted no business for its own account. No Federal income tax return was filed by CG for 1975.

On their individual returns, petitioners deducted their distributive shares of the losses reported by BHPP for the foregoing years. In his notices of deficiency, respondent disallowed those deductions, determining that the losses were properly attributable to the corporate entities, Argo and CG, rather than to the partnership.

OPINION

Issue I. Attribution of losses

The first issue for decision is whether the losses incurred by the construction and operation of the Biloxi Hilton Hotel project are attributable to Argo and/or CG, as respondent contends, or to BHPP, as petitioners contend. In particular, petitioners contend that the corporations acted solely as agents of the partnership, holding record title to the properties and obtaining project financing on behalf of the partnership solely because of local usury restrictions, in the case of Argo, and solely at the instigation of Bankers Trust, in the case of CG. As such, petitioners conclude, it is the partnership, as the principal, which is responsible for the tax consequences of the hotel project. Respondent answers that the losses generated by the project are properly attributable to the corporations since no agency relationship between them and BHPP has been established for tax purposes.

In two recent Court reviewed opinions, Roccaforte v. Commissioner,

77 T.C. 263 (1981), revd. 708 F.2d 986 (5th Cir. 1983), and Ourisman v. Commissioner, 82 T.C. 171 (1984), on appeal (4th Cir., June 25, 1984), we have carefully considered the issue of whether a corporation will be treated as a nontaxable agent for a partnership. In each of those cases, the taxpayers formed a partnership to construct and operate certain real estate developments. In order to secure financing for each project, the lenders required that the nominal borrower be a corporation in order to avoid local usury restrictions. As in the present case, corporations were formed which acquired record title to the properties involved and executed documents necessary to secure project financing. In each case, at least a number of the partners personally guaranteed the loans, and it was the understanding of the partners as well as the lenders that the corporation was to act as agent for the partnership, holding record title to the properties while the partners remained the true owners of the properties involved. In neither case did the corporation have any assets

(other than record title to the properties) or perform services for any parties other than the partnership.

Looking to the six-part test established by the Supreme Court in National Carbide Corporation v. Commissioner, 336 U.S. 422, 437 (1949), we held on the facts and circumstances in Roccaforte and Ourisman that the corporations there involved acted as agents of their respective partnerships, which remained the true owners of the projects, and that it was therefore the partnerships to which the tax consequences of the construction and operation of such projects flowed. The factors which comprise the National Carbide test are: (1) Whether the corporation operates in the name and for the account of the partnership; (2) whether the principal is bound by the actions of the corporate agent; (3) whether the corporate agent transmitted the money received to the partnership; (4) whether receipt of income is attributable to the assets or employees of the partnership; (5) whether the corporate agent's relationship with the partnership was

dependent on the fact that it was owned and controlled by the partners; and (6) whether the corporation's activities were consistent with the normal duties of the agent.[12]

We believe that the facts disclosed in the instant case, viewed in light of these six National Carbide factors, compel the conclusion that for Federal income tax purposes, it was BHPP, and not Argo, that was the owner of the Biloxi

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12. In Roccaforte v. Commissioner, 77 T.C. 263 (1981), revd. 708 F.2d 986 (5th Cir. 1983), the Fifth Circuit, reversing the findings of this Court, held that the fifth National Carbide factor is mandatory and absolute. 708 F.2d at 989. However, in Ourisman v. Commissioner, 82 T.C. 171 (1984), on appeal (4th Cir. June 25, 1984), we disagreed with the Fifth Circuit's holding on this point, and followed our decision in Roccaforte. Since, with the exception of Docket Nos. 12544-80 and 17023-81, with respect to which appeal would lie to the Fourth Circuit, appeal of the remaining eighteen of the instant docket numbers would lie to the Fifth Circuit, we are bound to follow the holding of the Fifth Circuit in Roccaforte with respect to such cases - that the fifth factor of National Carbide is mandatory and absolute. Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971). As to Docket Nos. 12544-80 and 17023-81, however, we shall adhere to our holdings in Roccaforte and Ourisman.

Hilton Hotel, but that it was CG and later Argo, and not BHPP, that were the owners of the golf course associated with such hotel.

As to Argo, as early as 1973, when Yemelos and his accountant first met with Galloway concerning construction financing, the subject of the usury problem under Mississippi law was discussed and Yemelos stated his wish to use a conduit corporation, a term which Galloway understood to mean a corporate agent which holds title for the equitable owner of property. Yemelos formed Argo in Louisiana for the purpose, inter alia, of taking certain actions relative to real estate to which it held title "as may be required of it by the beneficial owner or owners thereof * * *," and this purpose was reiterated in the application by which Yemelos later sought to qualify Argo to transact business in Mississippi. At that time, the owner of the hotel site was Casren, in which Yemelos had an 80 percent controlling interest.

After MIW's rejection of the use of Galloway's corporate nominee, Conduit,

as the agent which would hold title to the hotel property, it was decided that Argo would serve in such capacity. Argo's agency status was clearly disclosed in its October 5, 1973 trust agreement with Yemelos, and with the advent of BHPP as Casren's successor in December of 1975, in its nominee agreement with that partnership. Pursuant to both such agreements, Argo was prohibited from transacting any business for its own account.

While it is true that the 1975 nominee agreement was not publicly recorded, the evidence amply demonstrates that the primary institutions involved in financing the hotel project were aware of Argo's status as an agent. Both Galloway, acting as counsel to MIW, and Edward J. DeMartini, acting as counsel to and a director of Colonial, were aware that Argo held legal title to the hotel site solely as agent for Yemelos. DeMartini further testified that Argo's agency status was discussed at Colonial's director's meetings. The president of MIW, Peyton Fletcher III, confirmed that he was aware that Yemelos

was the real borrower, and that his company was loaning the construction funds to a nominee corporation solely because of local usury laws. Fletcher also testified that he neither requested financial statements nor inquired as to the financial history or status of the corporate nominee, Argo.

Consistent with the conclusion that MIW was well aware of Argo's agency status, the extensive documentation relating to agreements between Argo, BHPP and MIW executed on December 27, 1976, is replete with written declarations that Argo held the hotel properties for the benefit of BHPP.

It is also significant that Yemelos and his wife provided a series of continuing construction loan guarantees in 1973, 1974 and 1975, personally guaranteeing the entire $8,000,000 indebtedness to MIW. It is clear that the lending institutions looked with respect to such guarantees to Yemelos in his individual capacity, and not, as contended for by respondent, as a shareholder of Argo. Thus, Colonial's DeMartini testified on cross-examination by respon-

dent as follows:

Q. So [the nominee corporation] served a convenience for the beneficial owner, correct?

A. Well, no, I do not know if I would put it that way. It was simply * * * a project that was to be done. The person to do it was Mr. Yemelos and he was a valued customer of the bank and I guess [of] MIW also. * * * we were very pleased to have Argo on the note and Argo owning the property so long as we had Mr. Yemelos personally guaranteeing the note * * *.

Q. Because you knew that Mr. Yemelos with his guarantee would at that point pay you back whereas you did not know anything about his wholly owned corporation?

A. As far as I knew the wholly owned corporation did not have

> any assets at all but I was not concerned about that.
>
> Q. Because you knew that he was the borrower - -
>
> A. He was the borrower there was no doubt in my mind * * *. We were making the loan to Mr. Yemelos and we were going to look to Mr. Yemelos for payment.

Similarly, MIW's Fletcher testified that "Mr. Yemelos did put his name on the guarantee agreement and I was looking to the man that had the wherewithal to back up the investment that we were making."

We note, finally, that on its Federal income tax returns for 1975, 1976 and 1977, Argo described itself as a "nominee" corporation which transacted no business for its own account. On this record, petitioners have clearly demonstrated Argo's qualification under the first National Carbide factor with respect to its development of the hotel site.

As acknowledged by petitioners, the situation involving CG, which acquired and held title to the golf course until December 27, 1976, was "entirely different" from that of Argo. Unlike Argo, we have found that CG was used not to avoid local usury restrictions, but to meet the dual interests of Yemelos, who wished to limit his personal liability to $100,000, and of Bankers Trust, which wished to carry the full amount of the $1,045,000 note on its financial statements. There is no evidence in this record to show that these parties intended that CG would serve as an agent to hold title for the beneficial interest of Yemelos. As with Argo, neither the note nor Yemelos' partial guarantee described CG as an agent. In contrast to Argo, however, no representative of the lending institution, Bankers Trust, testified at trial. Yemelos himself testified that the corporate entity was used for the "primary purpose" of limiting his own personal liability. While it is true that CG, like Argo, executed a nominee agreement with BHPP on December 31, 1975, it is

clear that the existence of such an agreement is not conclusive proof of an agent-principal relationship. Ourisman v. Commissioner, supra, at 182. In the absence of any corroborative evidence, we conclude that CG was acting in its own name and for its own account during its ownership of the golf course between August 19, 1975 and December 27, 1976.

As to the second National Carbide factor, we have found that the primary project creditors were aware that Argo acted as the corporate agent of Casren, and later, of BHPP. The Argo nominee agreement provided that BHPP remained the real party in interest with respect to the project, and indemnified Argo against any loss or liability arising through its actions relative to the project. Yemelos and his wife personally guaranteed the entire $8,000,000 indebtedness to MIW, and BHPP expressly assumed liability therefor in December of 1976. It is evident that Yemelos, who controlled both Casren and BHPP, and who was a general partner of BHPP, considered himself bound by the acts of Argo.

As to CG, clearly its actions did not bind the partnership. The primary project creditor was not aware that CG acted as a corporate-agent. Furthermore, in the event of a default by CG, the lender would only have had recourse to Yemelos to the extent of his $100,000 guarantee, which represented a small portion of the total indebtedness on the golf course. Yemelos' wish to limit his liability in this manner was a key reason for the use of CG.

Turning to the third National Carbide factor, we note that neither corporation maintained a bank account. During construction of the hotel, most draws from MIW were paid to Galloway, counsel for MIW, who deposited them in a trust account, from which he issued checks to contractors or suppliers. In the few instances where checks were issued to Argo, they were endorsed by Argo and deposited into Casren's bank account. To the limited extent that this factor pertains, therefore, it supports the position of petitioners. See Ourisman v. Commissioner, supra at 183.

As to the fourth National Carbide factor, the corporations in this case had no employees, no assets beyond legal title to the hotel and golf course properties, and in July of 1977, they transferred title to such properties to the partnership. Neither corporation was capitalized, and all stock in each was owned by Yemelos and his wife, individually, and not by Casren or BHPP. At all relevant times, the partners believed themselves to be and generally acted as the owners of the hotel and golf course properties. Acting for Casren and/or BHPP, Yemelos established the putative corporate-agents, after acquiring the hotel site, and performed the activities necessary to arrange for financing, construction and operation of the hotel project. The activities of the corporations were essentially limited to holding record title, executing necessary loan documents, and endorsing certain loan advances to Casren.

It is true, as respondent suggests, that Argo entered into two building contracts for the hotel project in 1973. We find it significant, however, that

Yemelos, who was well aware of Argo's nominee status, and who represented Casren, owned one-half of those building contractor corporations.

We conclude on this record, as we did in Roccaforte and Ourisman, that the income realized from the hotel project and golf course was attributable to the efforts and assets of the partners.[13]

With respect to the important fifth National Carbide factor, as we noted in Ourisman:

> The one crucial question under National Carbide concerns the essential nature of the relationship between the purported corporate agent and its shareholders.* * * The Supreme Court expressly recognized that a corporation could act as an agent for its owners under certain circumstances * * * and specified the indicia of a true agency relationship. There is no indication that the Court intended to deny a corporation the status of agent for its shareholders in spite of the presence of the indicia of agency (factors one through

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13. See also Bollinger v. Commissioner, T.C. Memo. 1984-560.

> four) merely because the agency is to some extent based upon the shareholders' control of the corporation (factor five).

Ourisman v. Commissioner, supra at 185-186.

In Roccaforte, corporate stock was issued to all partners "in exactly the same percentages as their partnership interest," Roccaforte v. Commissioner, 708 F.2d at 987, and the putative corporate agent was not compensated for its services. On these facts, we found, and the Fifth Circuit concurred, that the corporation's relationship was dependent on the fact that it was owned and controlled by the partners. See also Ourisman v. Commissioner, supra.

On April 20, 1984, the Fifth Circuit decided Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984), distinguishing its earlier holding in Roccaforte on the critical fifth National Carbide factor. In Moncrief, the Fifth Circuit found that the taxpayer had satisfied the fifth factor where, unlike Roccaforte, the corporate stock was not

issued to all partners in proportion to their partnership interests, but was wholly owned by the general partner, who held only a 25 percent interest in the partnership. See also Raphan v. United States, 3 Cl. Ct. 457, 461-462 (1983). Acknowledging that there is a "tension" between its holding in Roccaforte that the fifth factor is absolute and mandatory and the Supreme Court's holding in National Carbide that "What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor," National Carbide Corporation v. Commissioner, supra at 430, the Fifth Circuit nonetheless found it unnecessary to reconcile that tension in Moncrief since it was clear that the partnership was not the owner of the corporate agent. Moncrief v. United States, 730 F.2d at 283.

In a recent Memorandum Opinion of this Court, Bollinger v. Commissioner, T.C. Memo 1984-560, finding that the taxpayer had satisfied the fifth National Carbide factor where his wholly-

owned corporation performed services for seven partnerships, in five of which he held ownership interests ranging from 33-1/3 percent to 66-2/3 percent, we concluded that "[a]lthough [the corporation] was not compensated for the services it performed, because in at least five developments the partners did not own the stock of the corporation in the same percentage as their partnership interest, we believe that the agency relationship was not based upon the partners' ownership and control of both entities."

In the instant case, Yemelos initially agreed to adopt Galloway's recommendation to employ the services of Conduit, a corporate nominee in which neither he nor any other participant in Casren or partner in BHPP held any ownership interest, for a fee of $1,000. Specimen documents were prepared and transmitted to MIW for its approval. Faced with the opposition of the lending institution to the use of Conduit, however, and in view of the shortness of time before the scheduled loan closing, it was determined that Argo should be

employed to hold title to the hotel site, and later, that CG should hold title to the golf course.

All stock in Argo and CG was held by Yemelos and his wife. Yemelos' wife held no interest in Casren or BHPP. In 1975, Yemelos owned an 80 percent interest in Casren. From early 1976 until November of that year, Yemelos owned a 68.9 percent interest in Casren's successor, BHPP. From November of 1976 until the middle of December of 1977, Yemelos' interest was further reduced to 61.76 percent.

While not free from doubt, we are persuaded on balance that the relationship of Argo and CG to Casren and BHPP was not dependent upon the ownership and control of the former two entities by the latter two entities. We thus conclude that the facts of the instant case are distinguishable on this important point from the facts in Roccaforte, and that we are not bound by Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971), to follow the result reached by the Fifth Circuit on different facts in that case.

As to the sixth National Carbide factor, we believe that the activities of Argo, but not of CG, were entirely consistent with the normal duties of an agent. It is true that written nominee agreements ascribed an agency status to both corporations. While Argo's agency status was clearly revealed to significant third parties, however, CG's was not. Yemelos and his wife guaranteed the entirety of Argo's indebtedness, but for all except a small portion of CG's indebtedness, no guarantee was provided. The sole purpose of Argo's participation in the hotel project was to acquire financing for the partnership from lenders who wished to circumvent local usury laws, and its activities in pursuit of that purpose were fully consistent with the role of an agent. See Moncrief v. United States, supra at 286. On the other hand, CG was formed, as stated by Yemelos, for the primary purpose of limiting his liability, and we are unable to find in its formation or activities the requisite indicia of a corporate agency.

As we have found, the Biloxi Hilton Hotel project consisted of a number of separate parcels, together with improvements thereto. As to the Vapors Club and Stag Club parcels acquired by Yemelos on behalf of Casren on September 24, 1973, and then conveyed to BHPP on December 31, 1975,[14] and the S.B.A. parcel acquired by Yemelos on behalf of Casren on October 2, 1975, and then conveyed to BHPP on July 29, 1977, we face no issue of corporate agency. However, as to the 7.5 acre hotel site, which was conveyed to Argo on October 10, 1973, and the improvements constructed thereon, our analysis of the six National Carbide factors persuades us that Argo served as the agent of Casren from that date until December 31, 1975, and as the agent of BHPP from the latter date until July 29, 1977, when title thereto was conveyed to BHPP.

As to the golf course, which was acquired by CG on August 19, 1975, our

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14. We are unable to conclude on this record that title to these parcels was ever conveyed to Argo, CG or any other purported corporate agent.

analysis under National Carbide persuades us that CG acted in its own name, for its own account, and not as a corporate agent from that date until December 27, 1976, when title thereto was conveyed to Argo. Furthermore, between December 27, 1976, and July 29, 1977, when title to the golf course was conveyed to BHPP, there is no evidence to persuade us that Argo served as the corporate agent of BHPP as to the golf course property.

It is conceded by respondent that the tax consequences of the hotel project and golf course were properly attributable to BHPP during the period July 29, 1977 through December 31, 1977.

We accordingly conclude that the partnership is entitled to claim all of the losses attributable to the construction and operation of the Biloxi Hilton Hotel project, except for those losses which are attributable to the golf course during the period August 19, 1975 through July 29, 1977. Exercising our best judgment in light of all of the evidence, Cohan v. Commissioner, 39 F.2d 540, 543-544 (2d Cir. 1930), affg. in

part and revg. in part 11 B.T.A. 743 (1928), and considering that the cost of acquiring the golf course was approximately 11 percent of the total costs of acquisition and construction of the project,[15] we conclude that, for the periods indicated, the losses claimed by BHPP relative to its construction and operation of the Biloxi Hilton Hotel project are allowable only to the following extent, and that petitioners were entitled to their distributive shares thereof, determined with reference to our disposition of Issue 2, infra:

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15. We have derived this percentage as a ratio of the cost of the golf course to the approximate costs of the entire project, determined as as follows:

Golf course	$1,045,000
Hotel site	225,000
Vapors/Stag parcels	376,566
S.B.A. parcel	210,000
MIW construction loans	6,700,000
	500,000
	800,000
Hilton license or franchise	20,000
Approximate total project costs, exclusive of personal property	$9,876,566

Period	Net loss		
		Hotel Project	Golf Course
	Claimed	Allowed	Disallowed
12/31/75	$ 684,999.00	$ 609,649.11	$ 75,349.89
1/1/76-10/31/76	969,358.94	862,729.45	106,629.48
11/1/76-12/31/76	598,594.00	532,748.66	65,845.34
1/1/77-7/28/77	575,447.00	512,147.83	63,299.17
7/29/77-12/15/77	704,741.00	704,741.00	-0-
12/16/77-12/31/77	593,913.00	593,913.00	-0-
Total	$4,127,052.94	$3,815,928.05	$311,123.88

Issue 2. Allocation of losses

The second issue for our decision is whether the allocation of losses among certain partners in commendam of BHPP possesses substantial economic effect.

As a threshold matter, however, petitioners contend that this matter is in issue solely as to those three petitioners who were newly admitted to the partnership on December 16, 1977 (McCollister, Carpenter and Fink). Respondent contends, on the other hand, that the matter is properly in issue for

each petitioner who was a partner in BHPP during 1975, 1976 and 1977. We agree with petitioners.

On brief, respondent makes the representations that "In the notices of deficiency, respondent disallowed certain losses claimed by petitioners * * * as distributive losses from BHPP," and that "The second theory for this disallowance was that the losses were allocated disproportionately, and that such allocation lacked substantial economic effect." Contrary to such representations, however, our examination of the deficiency notices and respondent's answers in each of the instant cases discloses no reference to the so-called "second theory" now contended for. Rather, the deficiency notices disallow petitioners' distributive shares of the subject losses, as to all petitioners, on the grounds of the foregoing corporate-agency issue, and as to eight of the petitioners who were admitted into the partnership on December 31, 1975,[16] on the alternative grounds of

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16. These include petitioners Wolcott, Ertan, George, Graham, Toups, Layne, Abshire and

disallowance of their distributive shares of any losses sustained by the partnership prior to such admission date. This retroactive allocation issue was conceded by petitioners, and is not in issue in these proceedings.

Respondent's so-called "second theory," respecting the allocation of bottom line losses within the partnership, has been placed in issue solely in those six cases in which respondent filed amended answers, and for the first time by such amended answers.[17] As noted in footnote 6, respondent at trial conceded increased deficiencies relating

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Rayford. As to the four additional petitioners admitted on that date, respondent determined no deficiencies against petitioners Prince and Norton for 1975, and failed to raise the retroactive allocation issue by way of the deficiency notice or his answers, against petitioners Frink and Frem F. Boustany, Sr.

17. It is clear that the retroactive allocation of losses for partners entering BHPP late in 1975, and the substantial economic effect of the allocation of losses under the partnership agreement, as amended, for 1975 through 1977, are distinct issues. Indeed, respondent emphasizes this distinction on brief, cautioning that "Petitioners appear to confuse disproportionate allocation and retroactive allocation."

to this issue as to three of these six petitioners. When asked by the Court whether he was withdrawing his amended answers as to these three petitioners, respondent replied in the affirmative.

It is clear that respondent seeks to raise an alternative theory in each of the instant cases. It is equally clear that such new matter must be properly pleaded by respondent. Estate of Horvath v. Commissioner, 59 T.C. 551, 556 (1973); Tauber v. Commissioner, 24 T.C. 179, 185 (1955). If the new matter is raised neither in the pleadings nor in an amendment thereto, then the issue ordinarily will not be heard by this Court. Rollert Residuary Trust v. Commissioner, 80 T.C. 619, 636 (1983), on appeal (6th Cir. August 29, 1983); Markwardt v. Commissioner, 64 T.C. 989, 997 (1975); Estate of Mandels v. Commissioner, 64 T.C. 61, 73 (1975); Robertson v. Commissioner, 55 T.C. 862, 865 (1971). Since respondent has properly pleaded this new matter in only six of the instant cases, and then has withdrawn such pleading in three of those, and since we conclude

that petitioners in the remaining fourteen docketed cases have had no fair notice of such matter, Markwardt v. Commissioner, supra at 997; Rule 31(a),[18] we proceed to a consideration of this second issue in the only three cases with respect to which it is properly before this Court, to wit:

Petitioners	Docket No.
David R. Carpenter Erica J. Carpenter	26988-82
Kenneth G. Fink, Jr. Carol Fink	26993-82
Donald L. McCollister Sandra M. McCollister	26994-82

Respondent, as he has acknowledged, bears the burden of proof on this issue. Rule 142(a).

Section 704(a) generally provides

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18. All references to Rules are to the Tax Court Rules of Practice and Procedure, and all statutory references herein are to sections of the Internal Revenue Code of 1954, as amended and in effect for the years in issue, unless otherwise stated.

that a partner's share of income, gain, loss, deduction, or credit shall be determined by the partnership agreement. For the tax year in issue, the general rule is limited by section 704(b), which provides that an allocation will be disregarded if it lacks substantial economic effect.[19] Pursuant to this test, an allocation of bottom line income or loss, or any item thereof, must have economic substance in the sense that it reflects the actual division of income or loss among the partners when viewed in light of economic, rather than tax, consequences. Goldfine v. Commissioner, 80 T.C. 843, 850 (1983). Thus, the partner to whom an item is allocated for tax purposes must also bear the economic benefits and burdens of that item. Goldfine v. Commissioner, supra at 851. In order to have substantial economic effect, a partner's allocation

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19. Sec. 704 was amended by sec. 213(d), Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1548. Sec. 704(b), as amended, replaced the former tax avoidance or evasion test with the substantial economic effect test, for taxable years beginning after December 31, 1975.

of bottom line income or loss, or of any item thereof,[20] must meet the test enunciated by this Court in Goldfine, as follows:

> If a partner's allocation of an item of income or deduction is reflected in his capital account and if the liquidation proceeds of the entity are distributed in accordance with the capital account balances, the allocation has substantial economic effect. [Citation and footnote omitted.] Moreover, where a partner's capital account registers a deficit, he must have the obligation upon liquidation to restore that deficit. Absent such an obligation, the other partner or partners would have to bear

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20. As recently noted by this Court, "[W]hatever the distinctions under pre-1976 law between 'item' allocations and 'bottom line' allocations, a discussion at long last laid to rest by the Tax Reform Act of 1976 * * *." Goldfine v. Commissioner, 80 T.C. 843, 855 (1983).

part of the economic cost of the special allocations that resulted in the deficit capital account.

Goldfine v. Commissioner, supra at 852.[21]

In the instant case, petitioners David R. Carpenter, Kenneth G. Fink, Jr. and Donald L. McCollister each became partners in commendam of BHPP for the first time on December 16, 1977, acquiring their partnership interests as follows:

Petitioner	Percentage partnership interest	Contribution
Carpenter	.5	$ 50,000
Fink	1.488	148,800
McCollister	.3	30,000

As we have found, there were six partners in commendam who were newly admitted pursuant to the second amended partnership agreement, including Carpen-

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21. See also Hirsch v. Commissioner, T.C. Memo. 1984-52.

ter, Fink and McCollister. From the time of their admission until December 31, 1977, these six partners were allocated 97.2 percent of all of BHPP's items of profit and loss. Collectively, these six partners owned a 5.888 percent interest in the partnership. As we have also found in section I, supra, the partnership was entitled to losses in the amount of $593,913, as claimed, for the same period. On their individual returns for 1977, Carpenter, Fink and McCollister claimed as their distributive shares of such losses, the respective amounts of $49,022, $145,890, and $29,413.[22]

In support of his contention that the allocation of losses to the foregoing petitioners in 1977 lacked substantial economic effect, respondent contends, first, that where the capital accounts of such petitioners registered a

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22. These deductions were apparently computed by applying to this 97.2 percent share of the losses for 1977, or $577,283.43, a fraction consisting of the ratio of each petitioner's partnership interest to the total 5.888 percent interst of the newly admitted partners.

deficit, they would not have the obligation to restore that deficit upon liquidation, and second, that the liquidation proceeds of BHPP would not be distributed in accordance with capital account balances.

There is no dispute herein that the allocation of losses to petitioners Carpenter, Fink and McCollister were reflected in their capital accounts for 1977.

Based upon the stipulation of the parties to the effect that each partner in commendam, including the three subject petitioners, would so testify, we have found that in the event of liquidation of the partnership, partners registering deficit balances in their capital accounts would not be required to restore such deficits. However, the factual circumstances here differ from those in Goldfine and Orrisch v. Commissioner, 55 T.C. 395 (1970), affd. per curiam, an unreported opinion (9th Cir. 1973), where we held that where a partner's capital account registers a deficit, he must have the obligation upon liquidation to restore that

deficit upon liquidation does not alone invalidate the allocations in issue.[24]

We turn next to a consideration of whether respondent has met his burden of proving that the proceeds upon liquidation of BHPP would not be distributed in accordance with capital account balances under the December 16, 1977 amendment to the partnership agreement.

Pursuant to the amended agreement, upon a sale of all or part of BHPP's property, the proceeds would be distributed, in the "sole discretion" of the general partners, to certain preferred groups, and then in the following percentages to certain generic groupings of partners in commendam, including an allocable percentage of 14.710 for the newly admitted partners. Within each such grouping, the proceeds would be distributed in proportion to each partner's ownership of "partnership stock." The "newly admitted" grouping consisted of the six partners admitted on December 16, 1977, including Carpen-

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24. See Dibble v. Commissioner, T.C. Memo. 1984-589.

ter, Fink and McCollister, to whom were allocated a 97.2 percent share of losses for the period during which they were partners in 1977. Thus, in the event of a sale in liquidation, these six partners would receive almost 15 percent of the proceeds, without regard to their capital accounts or to adjustments thereto resulting from the percentage share of losses to which they were entitled during their participation in the partnership in 1977.

Furthermore, as to distributions within the grouping of six "newly admitted" partners, the proceeds of any liquidation were to be distributed in proportion to the ownership of "partnership stock" by each such partner. The amendment to the partnership agreement defines "partnership stock" as "cash or other property furnished to the Partnership by a Partner as set out in Article 2808 of the Revised Civil Code of Louisiana and other applicable law, as amended."[25] By

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25. La. Civ. Code Ann. art. 2808 (West 1952, provides as follows:

> Property, when brought into partnership, or acquired by it, and the

contrast, "capital account" is defined in the amendment so as to include the original contribution of each partner, adjusted for additional contributions, allocable gains or losses, withdrawals by a partner, and distributions to a partner. It is therefore clear that the 14.710 percentage to which the six new partners would be entitled in the event of a liquidation, would be distributed among such partners in a proportion which would not be based upon their capital account balances.

Since the proceeds upon liquidation of BHPP would not be distributed to petitioners Carpenter, Fink and McCollister in accordance with their capital account balances, we conclude that respondent has met his burden of proving that the subject allocations of losses were without substantial economic effect. Allison v. United States, 701 F.2d 933, 940 (Fed. Cir. 1983); Goldfine v. Commissioner, supra at 856.[26]

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profits, when they are kept undivided for the benefit of the partnership, are called partnership stock.

Where an allocation of losses lacks substantial economic effect, section 704(b) requires that the partner's distributive share of such losses shall be "determined in accordance with the partner's interest in the partnership * * *." By stipulated agreement of the parties, such distributive shares for the three subject petitioners in 1977 have been determined to be as follows:

Petitioner	Distributive share of Partnership loss - 1977
Carpenter	$2,969.57
Fink[27]	8,837.43
McCollister	1,781.74

To reflect the foregoing,

Decisions will be entered under Rule 155.

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26. Compare sec. 1.704-1(b)(2)(ii), Prop. Income Tax Regs., 48 Fed. Reg. 9871 (1983).

27. In an apparent typographical error, the stipulation refers to "Kenneth G. Frink, Jr.," to rather than petitioner Kenneth G. Fink, Jr.

APPENDIX G

[CCH Dec. 41,566(M)] Jesse C. Bollinger, Jr., et al.[1] v. Commissioner.

Docket Nos. 5883-78, 5884-78, 5885-78, 5886-78, 5887-78, 17521-80, 5430-81, 5431-81, 5432-81. T.C. Memo. 1984-560. Filed October 18, 1984. [Appealable, barring stipulation to the contrary, to CA-6. -- CCH]

Charles R. Hembree and Philip E. Wilson, Kincaid Tower, Lexington, Ky., for the petitioners. Mark S. Feuer, for the respondent.

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1. Cases of the following petitioners are consolidated herewith: Edward H. Peter, Jr., and Mary H. Peter, docket No. 5884-78; Paul W. Hensley and Mary N. Hensley, docket No. 5885-78; Jesse C. Bollinger, Jr., and Suz-Anne Bollinger, docket No. 5886-78; Jesse C. Bollinger, Jr., and Jacqueline Bollinger, docket No. 5887-78; Jesse C. Bollinger, Jr., and Suz-Anne C. Bollinger, docket No. 17521-80; Edward H. Peter, Jr., and Mary H. Peter, docket No. 5430-81; Jesse C. Bollinger, Jr., and Suz-anne C. Bollinger, docket No. 5431-81; Paul W. Hensley and Mary N. Hensley, docket No. 5432-81.

MEMORANDUM FINDINGS OF FACT AND OPINION

WILES, Judge: Respondent determined the following deficiencies in petitioners' Federal income taxes:

Petitioner	Docket No.	Taxable Year	Deficiency
Jesse C. Bollinger, Jr.	5883-78	1971	$ 59,989.91
		1972	3,622.44
Edward H. Peter, Jr., and Mary H. Peter	5884-78	1969	3,617.64
		1970	25,227.36
		1971	27,406.41
		1972	3,576.37
		1973	93,571.11
Paul W. Hensley and Mary N. Hensley	5885-78	1967	1,833.82
		1969	3,021.17
		1970	3,653.99
		1971	12,901.76
		1972	5,545.05
		1973	6,335.24
Jesse C. Bollinger, Jr., and Suz-Anne Bollinger	5886-78	1973	103,712.86
Jesse C. Bollinger, Jr., and Jacqueline Bollinger	5887-78	1969	32,986.91
		1970	28,273.84
Jesse C. Bollinger, Jr., and Suz-Anne Bollinger	17521-80	1976	110,823.25
Edward H. Peter, Jr., and Mary H. Peter	5430-81	1976	35,161.66
		1977	99,060.34
Jesse C. Bollinger, Jr., and Suz-Anne C. Bollinger	5431-81	1977	84,553.74
Paul W. Hensley and Mary N. Hensley	5432-81	1977	8,876.97

After concessions by the parties, the sole issue for decision is whether the losses generated by the construction and operation of various apartment complexes are attributable to the partnerships which operated the apartment buildings or to the corporation which was created to act as an agent for the partnerships for certain limited purposes.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioners, Jesse C. Bollinger, Jr. (hereinafter Bollinger), Suz-Anne C. Bollinger, husband and wife, resided in Glenview, Kentucky, when they filed their petitions herein. Jesse C. and Suz-Anne C. Bollinger filed joint Federal income tax returns for their 1973, 1974, 1975, 1976, and 1977 taxable years with the Internal Revenue Service Center in Memphis, Tennessee. Petitioner Jacqueline Bollinger (Bollinger's former wife) resided in Louisville, Kentucky, when she filed her

petition herein. Petitioners, Jesse C. and Jacqueline Bollinger, filed joint Federal income tax returns for 1969 and 1970 taxable years with the Internal Revenue Service Center in Memphis, Tennessee. Bollinger filed his individual Federal income tax returns for his 1971 and 1972 taxable years with the Internal Revenue Service Center in Memphis, Tennessee.

Petitioners, Edward H. Peter, Jr., (hereinafter Peter) and Mary H. Peter, resided in Louisville, Kentucky, when they filed their petitions herein. Edward H. and Mary H. Peter, filed joint Federal income tax returns for their 1969, 1970, 1971, 1972, 1973, 1974, and 1975 taxable years, and an amended tax return for their 1973 taxable year, with the Internal Revenue Service Center in Memphis, Tennessee.

Petitioners, Paul W. Hensley (hereinafter Hensley) and Mary N. Hensley, husband and wife, resided in Lexington, Kentucky, when they filed their petitions herein. Paul W. and Mary N. Hensley, filed joint Federal income tax returns for their 1969, 1970,

1971, 1972, 1973, 1974, 1975, 1976, and 1977 taxable years with the Internal Revenue Service Center in Memphis, Tennessee.

During the years in issue, Bollinger was engaged in the business of real estate development. Bollinger, either individually or in partnership with others, developed the following apartment complexes in the State of Kentucky: Creekside North Apartments; Carriage Hill Apartments; Creekside South Apartments; Les Chateaux Apartments; Lamplighter Apartments; Two Lakes Apartments; Ski Lodge Apartments; and Cloister Apartments. In order to obtain construction financing for the various apartment complexes, financial institutions required that the nominal debtor be a corporate nominee of the partnership,[2] and accordingly, record title to the various properties was held by the corporate borrower. The following chart shows the apartment complex constructed, the partnership construct-

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2. For the purposes of this opinion the term partnership includes sole proprietorship.

ing the complex, the individual's interest in the partnership, and the corporate nominee holding title:

Apartment Complex	Partnership	Individual's Interest in the Partnership: Bollinger	Peter	Hensley	George Martin	Samuel Zell	Robert Laurie	Title
1. Creekside North*	*	100%						Creekside Inc (1)
2. Carriage Hill	Carriage Hill	66-2/3%		33-1/3%				Creekside Inc
3. Creekside South	Creekside South	50%	50%					Creekside Inc
4. Les Chateaux	Les Chateaux	33-1/3%	33-1/3%	33-1/3%				Creekside Inc (Sold Sept 1971)
5. Lamp-lighter	Lamp-lighter	33-1/3%	33-1/3%	33-1/3%				Creekside Inc
6. Two Lakes	Two Lakes:							
	7/16/71-9/10/74	50%				50%		Creekside Inc
	9/10/74-2/6/75	2%				98%		Howard Walker Trustee
	After 2/6/75	0				100%		Howard Walker Trustee
7. Ski Lodge*	*	100%						Creekside Inc (Sold 1975)
8. Colister	Cloister							Cloisters Inc
	7/15/73-1/4/74	50%			50%			(Until 12/31/74) (2)
	1/4/74-11/5/75	9-1/2%			9-1/2%	81%		Greenland Vistas Inc (3)
	After 11/5/75	0			0		19%	(After 12/31/74)

*Sole proprietorship.

(1) Creekside, Inc., a Kentucky corporation wholly owned by Bollinger.
(2) Cloisters, Inc., a Kentucky corporation wholly owned equally by Bollinger and Martin.
(3) Greenland Vistas, Inc., a Delaware corporation in which petitioners had no interest.

Sometime during 1968, Bollinger sought to construct an apartment complex on a portion of land owned at the time by Beacon Hill, Inc. In order to secure the construction loan and permanent financing for the proposed development of the Creekside North Apartments, Bollinger consulted with Mr. Bryan Sumner (hereinafter Sumner), a mortgage banker in Louisville, Kentucky.[3] Bollinger was advised that financing could be obtained for real estate development projects only through a "corporate nominee." During the years in issue, Kentucky law provided that a loan made to a noncorporate borrower at a rate exceeding 7 percent per annum was usurious. During such period, the prevailing local interest rate for construction financing was

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3. Bollinger would first obtain a commitment for permanent financing, in which a financial institution, usually an insurance company, agreed to loan him the anticipated cost of the project after the project was completed. The actual funds for construction were obtained from another financial institution, usually a bank, through a construction loan. When the project was completed, Bollinger would use the permanent financing to pay off the construction loan.

over 7 percent. In order to obtain the construction loan and permanent financing, the financial institutions required that the nominal debtor be Bollinger's corporate nominee, and accordingly, record title to the property would be held by the corporate borrower. On July 24, 1968, Sumner obtained a loan commitment for permanent financing from Massachusetts Mutual Life Insurance Company (Massachusetts Mutual Life) in which Massachusetts Mutual Life agreed to loan "the corporate nominee of Jesse C. Bollinger, Jr.", $1,075,000 at an interest rate of 8 percent per annum. The loan was to be secured by a mortgage on Creekside North Apartments and by a personal guarantee of Bollinger.

Bollinger, desirous to hold title in the apartment complex in his individual name, conferred with his accountant and his attorney, whereupon he was advised that the use of corporate nominees in order to obtain construction financing was common practice in the State of Kentucky. On October 14, 1968, Bollinger incorporated Creekside, Inc., under the laws of the Commonwealth of

Kentucky, for the sole purpose of having a nominee corporation to secure financing for the development of his apartment projects. At all relevant times Bollinger was the sole shareholder of Creekside, Inc.

On October 15, 1968, Bollinger and Creekside, Inc., entered into an agreement which generally provided that Creekside, Inc., would hold title to the Creekside Apartment Complex as Bollinger's agent only for the purpose of securing temporary and permanent financing of the project.[4]

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4. The nominee agreement provided in pertinent part:

Whereas, Bollinger proposes to construct apartments * * * in Lexington, * * * Kentucky. Said apartments to be known as Creekside Apartments * * *, and * * *

Whereas Citizens Fidelity Bank & Trust Company and Massachusetts Mutual Life Insurance Company have agreed to make such a mortgage loan, but have required that the real property securing such mortgage loan be held in the name of a corporation and such mortgage loan be made in the name of a corporation in order that such loan may bear an interest rate in excess of 7% per annum, and

Whereas, Creekside has agreed to hold the Creekside Apartments for Bollinger as the agent and nominee of Bollinger for the sole and only purpose of securing both temporary and permanent financing of the Creekside Apartment Project.

To finance construction of the Creekside North Apartments, Bollinger, through Creekside, Inc., borrowed the funds from Citizens Fidelity Bank and

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Now, Therefore, in consideration of the premises and the mutual covenants and agreements hereinafter made, it is herein and hereby agreed by and between Bollinger and Creekside as follows:

1. Creekside will accept a deed from Beacon Hill, Inc. * * * and will immediately mortgage such property to either Citizens Fidelity Bank & Trust Co. or Massachusetts Mutual Life Insurance Company for the purpose of acquiring funds with which to pay the purchase price for such lot and construct said apartments.

2. Creekside admits and declares that it will hold such property as nominee and agent for Bollinger and will convey, assign or encumber the property and disburse the proceeds thereof and dispose of the property, any purchase money, promissory notes, mortgages and trust deeds arising out of any sale thereof as and only as Bollinger may direct in writing.

3. Creekside does not obligate itself to care for or maintain the property or to advance money on account thereof whether for taxes or otherwise or to assume any liability for payment of money by execution of promissory notes or otherwise.

4. Bollinger does, herein and hereby, agree to indemnify and hold Creekside harmless from and against any liability it may or might sustain by reason of its acting as agent and nominee for Bollinger under the terms hereof.

Trust Company (hereinafter Citizens Fidelity). Creekside, Inc., executed all necessary loan documents including the promissory note, mortgage, and deed. Upon receipt, Creekside, Inc., transferred all loan proceeds to Bollinger's individual construction account.

Bollinger acted as general contractor during the construction of the Creekside North Apartments, and he employed Hensley on a fixed fee basis as construction supervisor. Hensley supervised the construction, ordered materials, scheduled the work and received, reviewed, and approved all invoices. After conferring with Bollinger about construction invoices submitted for payment, costs of the construction were paid by Hensley from the construction account. On completion of the Creekside North Apartments, Bollinger, through Creekside, Inc., obtained permanent financing from Massachusetts Mutual Life in accordance with its commitment letter of July 24, 1968. This loan was secured by a mortgage upon Creekside North Apartments and by a partial personal guarantee executed by Bol-

linger. The loan proceeds received from Massachusetts Mutual Life were used to pay off the prior construction loan obtained from Citizens Fidelity.

During all relevant times, Bollinger intended to retain all but record title to the property and apartment complex, and he intended that the corporation would convey record title to him as soon as conveyance became feasible. Bollinger always regarded himself as the real owner of the property. On November 8, 1979, Creekside, Inc., conveyed title to the property to Bollinger.

After the Creekside North Apartments were completed, Bollinger employed Mr. John Thompson (hereinafter Thompson) as resident manager to rent the apartments, execute leases for apartment rental, collect and deposit the rent received, and maintain operating records. Thompson deposited all rental receipts into, and paid all operating expenses from, a separate operating account at Central Bank and Trust Company in Lexington, Kentucky. Although the operating account was first opened in

the name of Creekside, Inc., it was changed during 1971 to "Creekside Apartments, a partnership."

The operation of the Creekside North Apartments generated losses in the amount of $41,071.17, $7,758.14, $3,416.76, $6,815.61, and $13,342.03, for the taxable years 1969, 1971, 1972, 1973, and 1974, respectively, and generated ordinary income in the amounts of $722.62, $25,805.62, $37,285.22, and $34,511.34, for the taxable years 1970, 1975, 1976, and 1977, respectively. The income and losses generated by Creekside North Apartments were reported by Bollinger on his individual income tax returns throughout the years in issue.

Petitioners secured financing for the construction of Carriage Hill, Creekside South, Les Chateaux, Lamplighter, Two Lakes, Ski Lodge, and Cloister Apartments through the use of a corporate nominee. In each case, the pattern was substantially identical to the development of the Creekside North Apartments. For each of the respective apartment complexes the financial institution required that the construction

loans and permanent financing be made to a corporate nominee with at least a partial personal guarantee by the partners; the partnerships executed nominee agreements, which were similar in all relevant respect to the agreement set forth in note 4, supra, with the corporation for the sole purpose of obtaining the financing; and the corporation transferred the construction loan proceeds upon receipt to the partnership's construction account from which all invoices were paid by the construction supervisor hired by the partnership.

Upon completion of each of the respective apartment complexes, the corporate nominee secured permanent financing which was used to pay off the construction loan. Each partnership actively managed its respective apartment complex depositing all rental receipts into, and paying all expenses from, a separate partnership account. Income and losses generated by each of the apartment complexes, except Ski Lodge, were reported by the respective partnerships on U. S. Partnership returns (Form

1065) filed for the years in issue. Petitioners in turn reported their distributive share of the partnership income and losses on their individual income tax returns filed during the years in issue. Bollinger reported the income and losses generated by Ski Lodge Apartments, a sole proprietorship, on his individual income tax returns.

At all relevant times, Bollinger, or the respective partnership, intended to retain all but record title to the apartment complexes. They always regarded themselves as the real owners of the property. It was only because the financial institutions would not provide either a partnership or an individual a construction loan or permanent financing for development of the projects that record title to the property was held by a nominee corporation, either Creekside, Inc., or Cloisters, Inc. In fact, in all loan commitment letters, except the one for Cloister Apartments, the financial institution required that the loan be made to the corporate nominee of Jesse C. Bollinger.

Creekside, Inc., acted as corporate nominee for the Carriage Hill, Creekside South, Les Chateaux, Lamplighter, Two Lakes, and Ski Lodge Apartments. Cloisters, Inc., acted as the corporate nominee for Cloister Apartment partnership. In order to secure the financing, Creekside, Inc., or Cloisters, Inc., as an agent for the respective partnership pursuant to the nominee agreement, signed the loan agreements, mortgages, deeds, and promissory notes in order to obtain the needed financing. At all relevant times, the lenders regarded Bollinger, or the respective partnership, as the owners of the apartment complexes. Financial institutions required partial personal guarantees from the partners and looked to them for repayment.

During the years in issue, Creekside, Inc., and Cloisters, Inc., had no liabilities, assets, employees, or bank accounts; nor did they manage the apartment complexes once the buildings were placed into service.

In the statutory notices of deficiency, respondent disallowed the

partners' claimed loss deductions determining that the partnership was not entitled to deduct expenses incurred during the construction, leasing, and operating of the various apartment complexes.[5] Respondent determined that such losses were those of the corporation which held record title to the real estate, either Creekside, Inc., or Cloisters, Inc.

OPINION

The sole issue for decision is whether the losses incurred by the construction and operation of the apartment complexes are attributable to the corporation or to the individual partners in the partnership. Petitioner argues that the corporation acted solely as an agent of the partnership, holding record

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5. We note that in the statutory notice, respondent maintained inconsistent positions with respect to the partnerships; he disallowed the loss deduction to the partners when the partnerships generated losses, but attributed the income to the partners in the latter years when most of the partnerships generated income.

title to the properties and obtaining project financing on behalf of the partnership only because of local usury restrictions. Thus, petitioners conclude that the partnership, as the principal, is the entity which is responsible for the tax consequences of the construction project. On the other hand, respondent maintains that there is no agency relationship recognized for tax purposes between the corporation and the partnership and that the losses generated by the projects are properly attributable to the corporation.

We have carefully considered the issue of whether a corporation will be treated as a nontaxable agent for a partnership in Roccaforte v. Commissioner [Dec. 38,122], 77 T.C. 263 (1981), revd. [83-2 USTC para. 9452] 708 F.2d 986 (5th Cir. 1983), and Ourisman v. Commissioner [Dec. 40,958], 82 T.C. 171 (1984), both Court Reviewed Opinions. In Roccaforte, the taxpayers formed a partnership to build and operate an apartment complex. As in the present case, in order to secure financing for the projects, the lenders

required that the nominal borrower be a corporation in order to avoid the state usury limitations. The partners formed a corporation and executed an agreement providing that the corporation was to act only as an agent for the partnership to obtain financing, that the partners remained the owners of the realty, and that the corporation would act only upon the authorization of the partners. The agreement further provided that the partners would hold the corporation harmless for all acts and debts related to the apartment complex. The corporation acquired record title to realty and executed the document necessary to obtain both the construction and the permanent loans. Several of the partners personally guaranteed the loans. The corporate creditors were all aware that the corporation represented the partnership. The corporation supervised the construction and maintained a checking account into which it deposited the loan advances and from which it made interest and progress payments. The corporation had no assets, liabilities, income, or expenses; nor did it manage the apart-

ment complex once the building was placed in service.

In Roccaforte, we decided that in National Carbide Corporation v. Commissioner [49-1 USTC para. 9223], 336 U.S. 422, 437 (1949), the Supreme Court established the following six factors to the considered in determining whether a true corporate agency relationship exists: (1) whether the corporation operates in the name and for the account of the partnership; (2) whether the principal is bound by the corporate-agent's actions; (3) whether the corporate-agent transmitted the money received to the partnership; (4) whether receipt of income is attributable to the assets or employees of the partnership; (5) whether the corporate-agent's relationship with the partnership was dependent on the fact that it was owned and controlled by the partners; and (6) whether the corporation's activities were consistent with the normal duties of an agent. No one factor is mandatory and absolute.[6]

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6. In Roccaforte v. Commissioner [Dec. 38,122], 77 T.C. 263 (1981), revd. [83-2 USTC para. 9452]

In Ourisman we reiterated our position that a corporation may, under the proper facts and circumstances, be considered as a true agent of the partnership. In Ourisman, the partnership wished to construct an office building. As in the present case, the usury laws prevented financial institutions from loaning the money directly to the individuals or the partnership. In order to obtain the financing, the lender required that the nominal debtor be the

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708 F.2d 986 (5th Cir. 1983), the Fifth Circuit reversed the finding of the Tax Court and held that the fifth factor is mandatory and absolute. 708 F.2d at 989. However, in Ourisman v. Commissioner [Dec. 40,958], 82 T.C. 171 (1984), we disagreed with the Fifth Circuit's interpretation of National Carbide v. Commissioner [49-1 USTC para. 9223], 336 U.S. 422 (1949), and decided to continue to follow our decision in Roccaforte. Since appeal of the instant case lies to other than the Fifth Circuit, we are not required to follow the Fifth Circuit's decision in Roccaforte. Golsen v. Commissioner [Dec. 30,049], 54 T.C. 742 (1970), affd. [71-2 USTC para. 9497] 445 F.2d 985 (10th Cir. 1971). We note, however, that the Fifth Circuit concluded, in a situation where the same parties did not own a controlling interest in both the partnership and the corporation, that the purported principal, the partnership, was in fact not the owner of the purported corporate agent. See Moncrief v. United States [84-1 USTC para. 9417], 730 F.2d 276 (5th Cir. 1984).

corporate nominee of the partnership, and accordingly, record title to the leasehold was held by the corporate nominee. The corporation executed the loan agreements as well as the promissory note and the deed of trust. The partners personally guaranteed payment of the construction loan and the partners always regarded themselves as the real owners of the property. As in the present case, the corporation never opened a bank account, loan proceeds were transferred to the partnership, the partnership made all interest and principal payments on the notes, the partnership operated and maintained the buildings, and the partnership reported the income and losses from the operation of the buildings. In Ourisman, applying the indicia of agency specified in National Carbide as we interpreted them in Roccaforte, we held that:

> [T]he present case compels the conclusion that the corporation acted as the partnership's agent in the construction and operation of the office building. The corporation acted in the name and for the account of the partnership. The corpora-

> tion was created at the insistence of the construction lender, which required that the loan be made to the corporate nominee of the partnership. * * * The agreement with the partnership also provided that the corporation would acquire the leasehold, obtain the necessary financing, and erect an office building solely as the nominee of the partnership, which would remain the corporation's principal and the true owner of the leasehold and improvements. [Ourisman v. Commissioner, supra at 181, 182.]

The present case is indistinguishable from Roccaforte and Ourisman, and the facts before us compel the same conclusion reached therein, that is, the partnerships, and not the corporations, were the owners of the apartment complexes for Federal income tax purposes.

Creekside, Inc. and Cloisters, Inc., operated in the name of, and for the account of, the partnerships it represented. For each apartment project, the corporations entered into a separate nominee agreement with the partnership. Pursuant to the agreement, the corporations were not authorized to act except at the direction of the partnership.

Further, the corporations never represented themselves as anything more than an agent of the partnership. Most lenders also required the partners to personally guarantee a portion of the loans needed for various projects. This indicates that throughout the years in issue, Creekside, Inc., and Cloisters, Inc., were acting as an agent for the underlying partnership. Indeed, the banks and financial institutions were well aware that the corporations were merely a shell. In fact, the lenders would not have lent the money directly to the individuals or the partnership because of usury laws and made most of the loan commitments to the corporate nominee of Jesse C. Bollinger.

The corporations also bound the partnerships by their actions. Project creditors were all well aware that the corporations were acting for the partnership. The nominee agreements provided that the partnerships remain the real party in interest with respect to the projects. The partnerships agreed to indemnify and hold harmless the corporation for any liability it

might sustain by reason of acting as an agent for the partnerships. The corporations were not obligated to care for or maintain the property. Finally, the partnership made all principal and interest payments on the loan and paid all other expenses associated with the apartment complexes.

The third factor specified by the Supreme Court in National Carbide is whether the corporation transmitted receipts to the partnerships. The only funds which passed to the corporations were the construction and permanent loan advances which the corporation would immediately endorse and forward to the partnership. Rental receipts and expenses were collected by the partnership and deposited immediately in partnership accounts.

The fourth factor is whether the income received from the apartment complexes was attributable to the employees and the assets of the partnerships. At no time throughout the years in issue did either Creekside, Inc., or Cloisters, Inc., have any employees or hire any one to act on its behalf.

Moreover, neither corporation had any assets beyond record title to the various apartment projects and, as soon as practical, the corporations conveyed title to the partnerships. At all relevant times, the partners believed themselves to be, and acted as, the owners of the apartment complexes. The partnerships hired the agents, performed the activities necessary to arrange the construction and operation of the apartment complexes, executed contracts, leases, and paid the costs of constructing and operating the apartment complexes. The partners located the land and coordinated all the activities concerning construction of the apartment complexes. The corporation's only activity consisted of holding record title, executing the necessary loan documents, and endorsing loan advances to the partnerships. On this record we must conclude, as we did in Ourisman and Roccaforte, that the income realized from the buildings was attributable to the efforts and the assets of the partners.

The fifth factor is whether the corporate-agent's relationship with the partners was dependent on the fact that it was owned and controlled by the partners. In the instant case, Creekside, Inc., acted as an agent for seven partnerships: Creekside North; Carriage Hill; Creekside South; Les Chateaux; Lamplighter; Two Lakes; and Ski Lodge. Although Bollinger owned 100 percent of the stock of Creekside, Inc., with the exception of the Creekside North Apartments and Ski Lodge Apartments, Bollinger did not have a 100 percent interest in all the partnerships. Bollinger had a 66-2/3 percent interest in the Carriage Hill partnership; a 50 percent interest in Creekside South and Two Lakes partnerships; and a 33-1/3 percent interest in Les Chateaux and Lamplighter partnerships. Thus, the facts before us are stronger than Roccaforte and Ourisman, where the corporations were controlled and dominated by the identical individuals who were investors in the partnerships.[7] Although Creekside,

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7. See Moncrief v. United States [84-1 USTC para. 9417], 730 F.2d 276 (5th Cir. 1984)(On

Inc., was not compensated for the services it performed, because in at least five developments the partners did not own the stock of the corporation in the same percentage as their partnership interest, we believe that the agency relationship was not based upon the partners' ownership and control of both entities. See Raphan v. United States [83-2 USTC para. 9613], 3 Cl. Ct. 457 (1983). With respect to Cloisters, Inc., in which the partners' ownership and control of both entities was in the same proportion, we must conclude that the corporate-agent's relationship with the partnership was dependent on the fact of common ownership and control. However, Cloisters, Inc., like Creekside, Inc., was acting as an agent for the partnership because it carried on only negligible activities, all persons dealing with it were aware it was acting as an agent, and the substantial ac-

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similar facts, the court upheld the jury's decision that the corporation acted as a true agent of the partnership because the corporate stock was held entirely by an individual who only had a 25 percent interest in the partnership and thus the partnership was in fact not the owner of the purported corporate agent.)

tivities involved in constructing and operating the building were performed by the partners. Since the corporations acted no differently than independent agents, they should be recognized for tax purposes as such. Ourisman v. Commissioner, supra at 187. See Raphan v. United States, supra at 463 ("Moreover, the narrow purpose of the agency agreement - holding nominal title to avoid usury problems - could have been performed equally well by a corporation unrelated to any of the parties.")

The final National Carbide factor is whether the corporation's activities were consistent with the normal duties of an agent. Both corporations, Creekside, Inc., and Cloisters, Inc., acted as an agent for the partnerships. The corporations executed a nominee agreement with each of the partnerships whereby Creekside, Inc. and Cloisters, Inc., agreed to hold title to the property for the sole purpose of obtaining financing for the construction of the apartments. Pursuant to that agreement the corporations executed the necessary documents to secure both tem-

porary and permanent financing for the partnerships' projects. The lenders were all fully aware that the corporations were acting as an agent of the partnerships and merely holding legal title to the property in order to satisfy the lenders' financing requirements. The corporations did not act in any manner which could be interpreted as an assertion of principalship.

On this record we must conclude, as we did in Roccaforte and Ourisman, that petitioners have clearly established that the corporations were acting as the partnerships' agent in the construction and operation of the various apartment complexes. What we stated in Roccaforte is equally applicable herein:

We are convinced that the investors desired to operate in partnership form and were forced to form a corporation to comply with the State's usury laws. The partners did not attempt to avail themselves of the normal benefits of the corporate form such as limited liability. Rather, the partners remained subject to the claims of creditors and to all other claims aris-

ing out of the apartment project.

We believe that the entire substance of the arrangement was one of an agency relationship, and even the form (outside of the corporation's primary liability on the mortgages) indicated the agency relationship that was intended. We are not presented here with the use of a corporation as a tax-avoidance scheme. Rather, the partners were forced to form a corporation in order to get financing for their project. They sought none of the traditional insulating benefits of a corporate shareholder. In substance, the partners were the true economic owners of the property with all the risks and benefits attendant thereto. In such cases, where the corporation was formed solely to satisfy the requirement of the bank in complying with State usury laws and the indicia of an agency relationship are present, we will respect the status of the corporation as an agent of the partnership. [77 T.C. at 278-288 (fn. ref. omitted), cited in Ourisman v. Commissioner, supra at 184.]

To reflect the foregoing concessions by the parties,

Decisions will be entered under Rule 155.